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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5446

JURIS STATEMENT NOT PRINTED

JOHN S. STEWART,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to rule 16(1) (b) of the Rules of this Court, appellee moves this Honorable Court to dismiss the appeal from the judgment of the Massachusetts Supreme Judicial Court on the grounds that it is manifest that the provisions of Massachusetts General Laws, ch. 265, §2 do not violate any rights of appellant guaranteed him by the Federal Constitution and, thus, no federal question is presented.

Opinion Below

The opinion of the court below (Pet. App. A.) is reported at 1971 Massachusetts Advance Sheets 1039 and 270 N.E. 2d 811.

Jurisdiction

The judgment of the Supreme Judicial Court of Massachusetts was entered on June 16, 1971. This judgment affirmed a conviction for murder in the first degree with a sentence of death under Massachusetts General Laws, Chapter 265, §§1, 2.

The notice of appeal was filed in the Supreme Judicial Court of the Commonwealth of Massachusetts on September 1, 1971 (Pet. App. C.) The appeal was docketed in this Court on September 13, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

Question Presented

Whether Massachusetts Gen. Laws, Ch. 265, §2, as construed by the highest court of the Commonwealth of Massachusetts, violates the rights of appellant as guaranteed by the Federal Constitution.

Statutes Involved

Mass. Gen. Laws, ch. 265, §1 provides:

> Murder committed with deliberately premeditated malice afore-thought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is

murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

Mass. Gen. Laws, ch. 265, §2 provides:

Whoever is guilty of murder in the first degree shall suffer the punishment of death, unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend that the sentence of death be not imposed, in which case he shall be punished by imprisonment in the state prison for life. No such recommendation shall be made by a jury or recorded by the court if the murder was committed in connection with the commission of rape or an attempt to commit rape. Whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life. No person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven while he is serving a life sentence for murder in the first degree; but if his sentence is commuted therefrom by the governor and council under the provisions of section one hundred and fifty-two of said chapter he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offences. Amended by St.1951, c. 203; St.1955, c. 770, § 78; St.1956, c. 731, § 12.

Statement

The appellant was indicted on charges of assault and battery with intent to murder, and murder of one Francis B. Johnson (Indictment No. 41063, R.2) [1] (a police offi-

[1] References "(R.)" refer to the printed record before the court below which has been submitted to this Court by the appellant. Following references "(Tr.)" refer to the transcript of the proceedings in the trial court.

cer); assault with intent to murder and assault and battery by means of a dangerous weapon, to wit, a pistol, upon one Michael J. Clancy (No. 41069, R. 65 and No. 41070, R. 72, respectively) and assault with intent to murder, and assault and battery by means of a dangerous weapon upon one John N. Reilly (No. 41071, R. 79 and No. 41072 R. 86) (patrons at a bar); assault with a dangerous weapon with intent to rob, and robbery of one Erskine P. Diamond (No. 41064, R. 30) and of one Joseph P. Flynn (No. 41065, R. 37) (patrons at the bar); assault with the dangerous weapon upon one Joseph A. Trocano (No. 41066, R. 44) and one Florence Murtha (No. 41067, R. 51) (a bartender and a waitress, respectively, of the bar); and unlawfully carrying upon his person a firearm (No. 41068, R. 58). On June 11, 1970, appellant was convicted by a jury on all charges (Tr. 1191-1193).

Upon inquiry by the foreman of the jury as to whether unanimity was necessary for clemency or not, the trial court submitted a written answer quoting a statement of the Massachusetts Supreme Judicial Court in *Commonwealth* v. *McNeil*, 328 Mass. 436, 442 (1952):

> "To our minds the plain implication is that the verdict (murder, first degree) has its usual consequence of death unless the jury join in a unanimous recommendation of mitigation." (Tr. 1189).

The jury having made a finding of guilty of murder in the first degree without having made a recommendation that the death sentence be not imposed (Tr. 1191), the trial judge polled each of the jurors individually with respect to the murder indictment, and each responded "guilty of murder in the first degree" or "guilty of first degree" (Tr. 1195). Thereupon the trial judge "imposed the penalty ordered by statute." (Tr. 1200).

The appellant appealed and on June 16, 1971, the convictions were affirmed. *Commonwealth* v. *Stewart*, 1971 Mass. Adv. Sh. 1039, 270 N.E. 2d 811. In its opinion, the Supreme Judicial Court reaffirmed its *McNeil* interpretation of G.L. c. 265, §2. 1971 Mass. Adv. Sh. at 1043, 270 N.E. 2d at 814.

The facts of this case are summarized in the lower court opinion. 1971 Mass. Adv. Sh. at 1039-1042, 270 N.E. 2d at 812-814.

Argument

I. Massachusetts Procedure In Capital Cases

Mass. Gen. Laws, ch. 265, §2, as amended by St. 1951, ch. 203 establishes the penalty to be imposed following a verdict of guilty of murder in the first degree. The pertinent text of the statute is as follows:

> "Whoever is guilty of murder in the first degree shall suffer the punishment of death, unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend that the sentence of death be not imposed, in which case he shall be punished by imprisonment in the state prison for life. . . ."

The 1951 amendment had added the provision allowing the jury to make a recommendation of clemency after finding a defendant guilty of a charge of murder in the first degree. The Massachusetts Supreme Judicial Court interpreted this statute in the case of *Commonwealth* v. *McNeil*, 328 Mass. 436 (1952).

In his concurring opinion in the case at bar Justice Cutter observed:

> "The interpretation made in the McNeil case. . .was made less than a year after the approval of the 1951 amendment (April 3, 1951) by a court which was at least generally familiar with its background and legislative history." 1971 Mass. Adv. Sh. at 1047, 270 N.E. 2d at 817.

In the *McNeil* case Massachusetts' highest court stated:

> "[T]he very words of our statute seem to us to *require* the death penalty for murder in the first degree, unless the jury, as a part of their verdict, recommend a lesser penalty. To our minds the plain implication is that the verdict has its *usual consequence* of death, unless the jury join in a *unanimous* recommendation of mitigation. Unanimity in the action of the jury is always required" 328 Mass. at 441-442 (emphasis added).

In essence, as construed by the highest court of the Commonwealth of Massachusetts, the statute *requires* that the death penalty be imposed whenever a jury returns a verdict of guilty of murder in the first degree. The death penalty is avoided *only* when the jury *unanimously* recommends clemency. The statute clearly does not establish two equally preferable punishments from which the jury may choose. In fact, the only action the jury is authorized to make by the statute regarding punishment is to recommend that the death penalty should not be imposed; the statute limits the jury's discretion to that narrow issue.

It cannot be gainsaid that appellant's present challenge to the *interpretation* of the Massachusetts statute in issue, has support when compared to the interpretations of similar statutes in other jurisdictions. *Commonwealth* v. *Stew-*

art fn. 2, 1971 Mass. Adv. Sh. at 1043, 270 N.E. 2d at 814. However, those decisions interpreted the challenged statutes as granting to the jury an absolute discretion to choose between alternative punishments. See e.g., *Andres* v. *United States*, 333 U.S. 740, 743, 748 (1948).

It is obvious that the Massachusetts Supreme Judicial Court had these other decisions before it when it heard appellant's challenge to the *McNeil* rule. But that Court expressly reaffirmed the *McNeil* interpretation of Mass. Gen. Laws, ch. 265, §2. Justice Cutter noted that the interpretation "has prevailed for nearly twenty years and is consistent with the statutory language." 1971 Mass. Adv. Sh. at 1047, 270 N.E. 2d at 817. See also *Commonwealth* v. *Vaughn*, 329 Mass. 333, 338 (1952); *Makarewicz* v. *Commonwealth*, 346 Mass. 478, 481 (1963); *Commonwealth* v. *Nassar*, 354 Mass. 249, 256 (1968).

This Court's decision in the *Andres* case, does not control the Commonwealth's interpretation of its own legislation. In *Andres* this Court interpreted the federal statute as granting to the jury absolute discretion on whether the accused should or should not be capitally punished. 333 U.S. at 743, 748. However, the Court observed that the Government's interpretation of the statute, identical to the construction given the Commonwealth's statute by the Massachusetts Supreme Judicial Court, could not be proven erroneous with certainty. 333 U.S. at 748. But more importantly, this Court did not find that its interpretation was constitutionally compelled. Moreover, Justice Frankfurter, in discussing reasonable types of legislation by which a state could retain capital punishment, while granting to the jury some discretion regarding the death penalty, described a statute the provisions of which are identical to those of Mass. Gen. Laws ch. 265, §2, as construed by the Massachusetts Supreme Judicial Court. 333 U.S. at 754 (concurring opinion).

II. Mass. Gen. Laws, ch. 265, §2, As Construed By the Massachusetts Supreme Judicial Court, Does Not Violate Any of Appellant's Constitutional Rights.

The case at bar presents no challenge to "the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820). Another case pending before this Court raises the question of whether imposition of the death penalty violates the Eighth Amendment. *Furman* v. *Georgia* No. 69-5003. Assuming that imposition of the death penalty does not amount to cruel and unusual punishment [see *Witherspoon* v. *Illinois*, 391 U.S. 510, 540 (1968) (White, J., dissenting) and *McGautha* v. *California*, 402 U.S. 183, 226 (1971) (Black, J. concurring)] it is appellee's contention that the instant appeal does not raise a federal question.

It is for the Massachusetts Court, short of constitutional infirmity, to interpret its own statutes. *Brady* v. *Maryland*, 373 U.S. 83, 90 (1963); *United States ex rel. Almeida* v. *Rundle*, 225 F. Supp. 936 (D.C.E.D. Pa. 1963) *aff'd* 383 F. 2d 421 (3rd Cir. 1967), *cert. den.*, 393 U.S. 863 (1968).

Since, on this record, there is no evidence that the appellant lost any benefits, rights or safeguards accorded to others charged with the crime of murder, Massachusetts' interpretation of its statute does not present a constitutional issue.

Even if the requirement of unanimity is found to be an indispensable element of the Sixth Amendment right to a jury trial [*Johnson* v. *Louisiana*, prob. juris. noted, 400 U.S. 900 (1970), restored to calendar for reargument, 402 U.S. ——, 91 S. Ct. 2288 (1971), and *Apodaca* v. *Oregon*,

cert. granted, 400 U.S. 901 (1970), restored to calendar for reargument, 402 U.S. ——, 91 S. Ct. 2289 (1971)] the unanimity requirement (if one there is) is clearly limited to the historically singular function of the jury, namely a determination of innocence or guilt. See *McGuatha* v. *California,* 402 U.S. 183, 198. There is nothing in the Constitution forbidding the states from imposing *mandatory* death sentences on those convicted of murder. How then can appellant argue that, since Massachusetts has allowed a man convicted of murder to be spared his life when all twelve jurors recommend such, his rights have been violated? What constitutional right has been violated?

Appellee contends that the claimed violation of the Sixth Amendment right to trial by jury [Appellant's Brief pp. 9-12] is patently frivolous. Appellant's only possible argument is that he has been denied due process of law.

But on this issue appellant is confined to arguments based on humanitarian considerations and "better ways" of having those convicted of murder pay their debts to society. Indeed, this Court could find that better penological methods exist or that Massachusetts could pass a more precise and compassionate statute for meting out punishment to those convicted of murder. However, that is not the function of the Court. Faced with similar considerations in *McGautha,* this Court said (at 221):

> "[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer* v. *Texas,* 385 U.S. 554 (1967). The Constitution requires no more

than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected."

Appellant has not shown any unfairness occurring at his trial. The jury at his trial was *not* a "tribunal organized to return a verdict of death" as has been condemned by this Court. *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 (1968). No argument is made in this appeal that the jury was unrepresentative of the community.

The jury was not limited to either imposing death or making a unanimous recommendation of clemency. In Massachusetts the degree of murder shall be found by the jury. Mass. Gen. Laws, ch. 265, §1. Second degree murder carries a mandatory life sentence. Mass. Gen. Laws, ch. 265, §2.

The trial judge gave detailed instructions on both first and second degree murder (Tr. 1139, 1141-1152). He instructed the jury clearly on the sentences that could be imposed if murder in the first or second degree was found (Tr. 1174-1176). In these circumstances it is clear that had the jury as a whole, or had any individual juror, wished that the appellant not be sentenced to death, then the jury, *or any individual juror or any group of jurors,* could have found the appellant guilty of second degree murder. Since the degree of murder required a unanimous finding by the jury (Tr. 1174), any juror who felt that the appellant should escape the death penalty could ensure that result by voting for a finding of second degree murder.

The result the appellant contends is demanded under the Due Process Clause of the Fourteenth Amendment (namely that a unanimous jury vote be required to impose the death penalty once guilt is determined) is, *in practice,* open to Massachusetts juries in all murder cases.

Faced with the knowledge that the death penalty would automatically follow their verdict if they returned a verdict of first degree murder without a clemency recommendation (Tr. 1189) the jurors nevertheless *all* voted for a first degree verdict (Tr. 1194-1195). Appellant should not now be heard to argue that he was sentenced to death without due process of law.

Simply because Massachusetts is in the minority on how it legislates and interprets the jury function in murder cases does not force the conclusion that appellant's constitutional rights have been violated. As this Court stated in *McGautha* (at 195-196):

> "Our function is not to impose on the States, *ex cathedra,* what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases".

Conclusion

For the reasons stated above, it is respectfully submitted that the motion to dismiss the appeal should be allowed on the ground that no federal question is presented.

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STEWART v. MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 71-5446. Decided June 29, 1972

Imposition and carrying out of death penalty in this case *held* to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. *Furman* v. *Georgia, ante,* p. 238. — Mass. —, 270 N. E. 2d 811, vacated and remanded.

PER CURIAM.

The appellant in this case was sentenced to death. The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman* v. *Georgia, ante,* p. 238. The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings.